STATE OF MICHIGAN

COURT OF APPEALS

J. SILVA GONCALVES,

Plaintiff-Appellant,

v

COMMUNITY SUPPORT AND TREATMENT SERVICES, WASHTENAW COUNTY HEALTH ORGANIZATION, and WASHTENAW COUNTY,

Defendants-Appellees.

UNPUBLISHED
February 28, 2006

No. 264450
Washtenaw Circuit Court
LC No. 03-001166-CZ

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In this wrongful termination action brought under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(10). Plaintiff was employed as Health Services Supervisor, Adult Outpatient and County Jail Mental Health Services by Community Support and Treatment Services (CSTS) of Washtenaw County. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 486; 705 NW2d 689 (2005). The trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*., quoting *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff argues that the trial court erred in dismissing his gender and national origin discrimination claims where he presented sufficient direct and circumstantial evidence to survive defendants' motion for summary disposition. MCL 37.2202(1)(a) provides that an employer

shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status."

Proof of discriminatory treatment may be established by direct evidence or indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."' *Hazle v Ford Motor Co*, 464 Mich 456, 456; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). "In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski, supra* at 133, quoting *Price Waterhouse v Hopkins*, 490 US 228, 244; 109 S Ct 1775; 104 L Ed 2d 268 (1989). "Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision." *Sniecinski*, *supra* at 133. However, once a plaintiff submits direct evidence that, if believed, would require the conclusion that unlawful discrimination was a motivating factor, the defendant cannot avoid trial by merely articulating a nondiscriminatory reason for the employment decision. *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

If there is no direct evidence of discrimination, then the plaintiff must proceed through the four steps set out in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to avoid summary disposition. *Hazle, supra* at 462. To establish a prima facie case of discrimination under the *McDonnell Douglas* analysis, as applied in Michigan, the plaintiff must prove by a preponderance of the evidence that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, but (4) he suffered the adverse employment action under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden shifts to the defendant to articulate and present admissible evidence in support of a legitimate, nondiscriminatory reason for its employment decision. *Hazle*, *supra* at 464. The burden then shifts back to the plaintiff to demonstrate that the evidence, when construed in his favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the defendant toward the plaintiff, i.e., that the defendant's reason was a pretext for unlawful discrimination. *Id*. at 465-466.

Plaintiff contends that his immediate supervisor's question regarding whether he had difficulty reporting to women because of his cultural background, coupled with her comment that "it's not going work" is sufficient direct evidence to create a genuine issue of material fact

regarding whether plaintiff's gender and national origin were the reason that he was terminated. We disagree.[1]

Initially, we note that the cited remarks were not made in connection with plaintiff's termination. To conclude from these remarks that plaintiff's subsequent termination was motivated by discriminatory animus, we must infer the relevant fact in issue. Such a reasoning process is inconsistent with the definition of direct evidence used in employment discrimination cases. See, e.g., *Sniecinski, supra* at 132-133. In other words, even if we were to believe that the remarks were made, we are not then required to conclude that "'unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle*, *supra* at 462, quoting *Jacklyn*, *supra* at 926.

Further, even if the remarks could be construed as being made in connection with plaintiff's termination, they do not suffice to defeat defendants' summary disposition motion. While a single remark from a supervisor in the context of a discussion regarding plaintiff's termination, even if the statement might be subject to multiple interpretations, is sufficient to constitute direct evidence, and the remark's weight and believability are matters for the fact-finder to determine, *DeBrow v Century 21 Great Lakes, Inc* (*After Remand*), 463 Mich 534, 539-540; 620 NW2d 836 (2001), a remark that is not made by a person involved in the termination of plaintiff's employment is irrelevant and cannot be attributed to the employer. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301; 624 NW2d 212 (2001). Here, plaintiff's immediate supervisor did not make the decision to terminate plaintiff. Rather, the CSTS director both testified and averred that she was the ultimate decisionmaker in this case. Therefore, we conclude plaintiff did not present sufficient direct evidence of discrimination to survive defendant's motion for summary disposition.

Plaintiff also argues that, under *McDonnell Douglas*, he presented sufficient circumstantial evidence to survive defendants' motion for summary disposition. Again, we disagree. Plaintiff concedes that defendants have articulated a legitimate, non-discriminatory reason for plaintiff's termination—his poor performance. Therefore, under *McDonnell Douglas*, the burden shifts to plaintiff to establish by a preponderance of the evidence that defendants' reason is a mere pretext for unlawful discrimination.

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[1] Plaintiff's argument is predicated on the assertion that in employment discrimination cases, direct evidence is defined more broadly than the well-established meaning applicable in all other situations. In support, plaintiff relies on *Wright v Southland Corp*, 187 F3d 1287 (CA 11, 1999). The *Southland* court identified "two possible definitions of 'direct evidence' in employment discrimination." *Id.* at 1294. The first definition *Southland* calls the "preponderance" definition, and the second is called the "dictionary" definition. *Id.* While *Southland* observes that "all indicators point toward adopting the preponderance definition," Michigan has clearly adopted *Southland's* dictionary definition. *Sniecinski, supra* at 132-133. Therefore, in our analysis of plaintiff's assertion that sufficient direct evidence of employment discrimination was shown to withstand a motion for summary disposition we will use the definition of direct evidence plaintiff urges us to reject.

Plaintiff relies on the following as evidence of pretext: (1) his immediate supervisor was unable to articulate any logical reasons at deposition for his termination; (2) plaintiff performed well and received praise from his co-workers and county officials; (3) the quarterly report, which was an assignment that was heavily criticized by plaintiff's supervisor, was timely and ultimately accepted by the management committee; (4) CSTS's executive director failed to follow through on the directives given by human resources personnel regarding addressing plaintiff's discrimination complaint, opting instead to fire him; (5) plaintiff's immediate supervisor had initially contemplated giving plaintiff an extended time within which to improve his performance, but reconsidered that decision after she learned of plaintiff's discrimination complaints; and (6) it was not common practice for defendants to fire probationary employees.

Even viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff's claims are either unsupported by the record or do not raise a genuine issue of material fact that defendants' proffered reason for plaintiff's termination—poor performance—was a mere pretext for discrimination. Stated another way, plaintiff failed to raise a question of material fact upon which reasonable minds could differ regarding whether discrimination on the basis of gender and national origin was a motivating factor in defendants' decision to terminate him.

Plaintiff also argues that the trial court erred in dismissing his retaliation claim. MCL 37.2701(a) prohibits retaliation against persons who either oppose violations of or who have filed a complaint under the CRA. To establish a prima facie case of retaliation under the CRA, plaintiff must show that (1) he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005); *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

At issue here is whether there was a causal connection between plaintiff's complaint of discrimination and his termination. To establish a causal connection, plaintiff must show that his participation in the protected activity was a "'significant factor'" in his employer's decision to terminate him, not just that there was a causal link between the two. *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004), quoting *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable factfinder to infer that an action had a discriminatory or retaliatory basis." *Rymal*, *supra* at 303; see also *Town v Michigan Bell Tel Co*, 455 Mich 688, 697; 568 NW2d 64 (1997). However, close temporal proximity by itself is not enough to establish causation for purposes of a retaliation claim. *Garg*, *supra* at 286.

Plaintiff argues that the close temporal proximity between his discrimination complaint and his termination, combined with the same alleged evidence cited in support of his assertion that CSTS's reason to terminate his employment was pretextual, is sufficient to establish the requisite causal connection. However, there is evidence that plaintiff knew his position was in jeopardy before he made his complaint of discrimination: plaintiff's supervisor issued a mid-probationary review detailing areas of concern with plaintiff's work and specific instances of

plaintiff's poor performance nearly two weeks before plaintiff made the allegations of discrimination.

"Summary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *West, supra* at 184. In *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 621-622; 566 NW2d 571 (1997), our Supreme Court held that the plaintiff failed to establish the necessary causal connection because she knew her discharge was imminent before the protected activity on which she based her whistleblower claim.[2] Stated another way, a "[p]laintiff cannot use [an antiretaliation provision of an employment discrimination statute] as a shield against being fired where [he] knew [he] [was] going to be fired before [engaging in protected activity]." *Id*. at 622. "To hold otherwise 'would encourage other employees to hold off [engaging in protected activity] until it becomes most advantageous for them to do so.'" *Id*., quoting *Wolcott v Champion Int'l Corp*, 691 F Supp 1052, 1066 (WD Mich, 1987). In other words, an employee who has received a bad review or other information suggesting that his job is in jeopardy might engage in protected activity merely "to extort [an employer] not to fire [him]." *Id*.

To prevail here, plaintiff was required to show that he was discharged *because* he made allegations of discrimination, but he has merely shown that he was discharged *after* he made allegations of discrimination. Plaintiff was required to show that his discharge was in some manner influenced by his allegations of discrimination, but he has failed to do so. The evidence shows a temporal sequence of events that plaintiff received a poor performance review placing him on notice that his job was in jeopardy, made allegations of discrimination, and was subsequently discharged. However, plaintiff did not present evidence that would allow a reasonable juror to find a causal connection between his allegations of discrimination and his discharge. Therefore, plaintiff failed to establish a prima facie case of retaliation and the trial court's grant of summary disposition in favor of defendants was proper.

Further, even if plaintiff did establish his prima facie case, the trial court's grant of summary disposition would still be appropriate because, as previously discussed, defendants proffered a legitimate, non-discriminatory reason for plaintiff's termination and plaintiff has not shown by a preponderance of the evidence that defendants' reason is a mere pretext.

Reviewing the entire record in a light most favorable to plaintiff, we conclude that plaintiff failed to meet his burden to produce sufficient evidence to raise a genuine issue of material fact regarding whether defendants' assertion of poor performance was a mere pretext to cover up a desire to retaliate against plaintiff for raising allegations of discrimination. Accordingly, the trial court's grant of summary disposition in favor of defendants was proper.

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[2] While *Shallal* dealt with a claim under the Whistleblowers' Protection Act, MCL 15.361 *et seq*., our Supreme Court noted that whistleblower statutes are analogous to antiretaliation provisions of other employment discrimination statutes and should receive similar treatment. *Id*. at 617.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald